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August 14, 2015

Utah Supreme Court
Attn. Andrea R. Martinez, Clerk of the Court
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P.O. Box 140210
Salt Lake City, Utah 84114-0210
VIA USPS FIRST CLASS and EMAIL: supremecourt@utcourts.gov

RE: Retention Request; *J.P. Furlong, Co. v. Board of Oil, Gas and Mining; Department of Natural Resources,* Appellate Case No. 20150260-SC

Ms. Martinez,

The issues presented by the appeal are simple, but the effects may be profound. Over the past half-century, the development of the natural resources of the State of Utah has been governed by a set of statutes designed to balance the needs of industry against the rights of property owners. The duty of the State Government is to ensure that the use of these resources occurs with due regard for the environment, the economy, and the expectations of the parties.

One particular rule adopted by the Utah Board of Oil, Gas and Mining has thrown this duty off-balance. Whether out of habit, or by lack of challenge, or via regulatory capture, the Board has grown comfortable using this rule to justify a very one-sided view of an agreement used in the oil and gas industry: the Joint Operating Agreement.

Utah Admin. Code Rule R649-2-9 provides that the operator - the entity that will drill the well - must have "in good faith, attempted to reach agreement" with a mineral owner or other non-operator for their investment and participation in drilling a well. If an owner does not agree to the terms offered by the operator, he may be deemed a "non-consenting party" under Utah Code Ann. §40-6-2 (11). Once this designation is made, statutory penalty provisions found in Utah Code Ann. § 40-6-6.5 (4)(d) can make it impossible for the non-operating owner of a mineral interest to enjoy *any* benefit from his ownership.

This is a serious problem for two reasons. First, an operator may, in good faith, offer a very one-sided deal to an owner, which the owner may have good reason to reject. However, the

governing regulation fails to balance the needs and behavior of the owner against those of the operator. The only relevant inquiry was whether or not the *operator* thought the deal was fair.

Second, the complexity and sheer length of the form contract used in many of these deals intimidates all but the most experienced – and least available – practitioners in this area of the law. There is no "standard form" Joint Operating Agreement. Each one is tailored to the particular parties and project. Having a rule in place that automatically gives industry-drafted and company-tailored contracts of adhesion a head-start in negotiations against unsophisticated individuals and small businesses tilts the playing field unacceptably.

In our case, the Board did not use this rule to impose a non-consent penalty on J.P. Furlong Co. But it is clear that years of operating under its reasoning influenced its deliberation and decision to impose a one-sided and unfair contract on my client. It presents non-operators with a terrible choice. Should I protest this terrible deal and risk being deemed a non-consenting party? Or should I sign this horrible contract and hope that it doesn't bankrupt me down the road? J.P. Furlong Co. is not the first company to face this dilemma, and it won't be the last. This implicit threat hangs over the head of every landowner in the State of Utah and has been the routine operating procedure before this administrative agency for years.

The case before the Court is simple: Did the Board abuse its discretion by imposing the contract proffered by the operator? Did the Board make its decision to impose that contract based on substantial evidence presented at the hearing? Did the Board interpret Utah Code Ann. § 40-6-6.5 correctly when it imposed the contract? Simple, yet profound. The advantage offered to the Board and the industry proponents of these adhesion contracts by the standard of review imposed upon appeals from an administrative agency is a massive hurdle. It is one few companies would be willing to face – and no individual landowner could easily afford. Yet, every year, the Board issues orders that imposes these contracts on companies and people that know the deal is rotten, but simply can't afford to protest.

This is an important issue of first impression. It goes to the heart of assumptions that industry and regulators have operated under for years and not questioned. People and companies that could not afford to protest – or even know what to protest – will have their day before a tribunal that has not fallen into the routine of "business as usual." There are gaps and cracks in the regulatory playing field, and the tilted caused by one-sided interpretation and discretion pours too many people through them. This case is an opportunity for the Court to even that field, and give ordinary Utahns a fair chance against a massive industry.

This appeal presents important questions of state law that have not been, but should be settled by this Court. For the reasons stated herein, J.P. Furlong Co. respectfully requests that this matter be retained in this Court for further proceedings.

Very Truly Yours,

RAMMELL LAW, PLLC

Justin C. Rammell
Anthony Hunter, Co-Counsel

JR/AH:daa
Enclosures
cc: Stephen F. Alder, stevealder@utah.gov, Attorney for Board of Oil, Gas and Mining
Michael S. Johnson, mikejohnson@utah.gov, Attorney for Board of Oil, Gas and Mining
Board of Oil, Gas and Mining, Attn. Julie Ann Carter, juliecarter@utah.gov

CHECKLIST FOR APPELLATE JURISDICTION

J.P. Furlong, Co. v. Board of Oil, Gas and Mining; Department of Natural Resources,
Appellate Case No. 20150260-SC

The case number before the Utah Board of Oil, Gas and Mining: Docket No. 2015-013; Cause No. 139-130

The date the final judgment was entered: *Amended Findings of Fact, Conclusions of Law and Order*, dated July 28, 2015.

The date of the filing of the appeal to which this retention request is directed: *Petition for Review* filed by J.P. Furlong Co. on August 3, 2015.

Whether any other appeals or cross-appeals in the same case have been filed: Yes ___ No _X_.
The date(s) of those appeal(s): Not applicable.

Whether the judgement listed above resolved the case as to all claims and parties: Yes _X_ No _____.

If no, whether the judgment was certified as final pursuant to Rule 54(b) of the Rules of Civil Procedure: Not applicable.

Whether the judgment listed above included a ruling concerning attorney fees: Yes ____ No __X__.

If attorney fees were awarded at any time, whether the amounts of all awards of fees were fied prior to the date of your latest appeal: Not applicable

Whether Rule 4(b) of the Rules of Appellate Procedure is applicable: Rule 4(b) is suspended in this administrative agency action by UT. R. APP. P. 18; however, EP Energy E&P Company, L.P.'s ("**EPE**") filed their *Petition for Reconsideration of Amended Findings of Fact and Conclusions of Law and Order*, on August 3, 2015, after which J.P. Furlong Co. and the State of Utah filed a *Joint Motion for Stay Pending Outcome of EPE's Reconsideration Request Before the Board,* which is currently pending before this Court.

Whether Rule 4(c) of the Rules of Appellate Procedure is applicable: Rule 4(c) has also been suspended by UT. R. APP. P. 18; however, the question of stay of the proceedings pending outcome of EPE's request for reconsideration before the Board is pending by motion filed with this Court.

Whether Rule 7(f)(2) of the Rules of Civil Procedure has been satisfied (see CUWCD v. King, 2013 UT 13): Yes __X__ No _____. **Additional information**: If Rule 7(f)(2) does not apply to these administrative agency proceedings, the *Amended Findings of Fact, Conclusions of Law and Order* meet the finality requirements contained in UTAH CODE ANN. §63G-4-208 and UTAH ADMIN. CODE RULE R641-109.

If yes, list the date of the order satisfying Rule 7(f)(2): July 28, 2015
If no, list any actions that have been taken to comply with the requirements of Rule 7(f)(2): Not applicable.

CHECKLIST FOR APPELLATE JURISDICTION (Continued)

J.P. Furlong, Co. v. Board of Oil, Gas and Mining; Department of Natural Resources,
Appellate Case No. 20150260-SC

Whether the time to file the appeal was extended: Yes _____ No __X__. List the date of any motion for an extension: Not applicable; and the date of the order extending the time: Not applicable

Whether the appeal was filed pursuant to Utah Code §78B-11-129: Yes _____ No __X__. If yes, list the subsection(s) of that provision that is (are) applicable: Not applicable

The statutory provision conferring appellate jurisdiction on this Court – ie, the applicable subsection of Utah Code §78A-3-102 **(3)(e)(iv).**